

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES H. KEMP, ROBERTO CRUZ,
NATAN VAISMAN and WALTER VONARBURG

Appeal No. 2002-2156
Application No. 29/113,438

ON BRIEF

Before ABRAMS, GARRIS, and GROSS, Administrative Patent Judges.
ABRAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of the following design claim:

The ornamental design for a toothbrush as shown and described.

We REVERSE.

BACKGROUND

The design is presented in the drawings in top, bottom, and side views.

The prior art references of record relied upon by the examiner in rejecting the appealed claim are:

Largever	Des. 92,616	Jun. 26, 1934
Hyman	Des. 265,354	Jul. 13, 1982
Vonarburg	Des. 418,982	Jan. 18, 2000 (filed Oct. 26, 1998)

The design claim stands rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claim of Vonarburg in view of Largever and Hyman.

The design claim also stands rejected under 35 U.S.C. § 103 as being unpatentable over Vonarburg in view of Largever and Hyman.¹

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejections, we make reference to the Answer (Paper No. 14) for the examiner's complete reasoning in support of the rejections, and to the Brief (Paper No. 13) for the appellants' arguments thereagainst.

¹ The appellants have not disputed the examiner's finding that Vonarburg constitutes prior art under 35 U.S.C. § 102(e).

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

There are two rejections before us. The first is based upon the judicially created doctrine of obviousness-type double patenting and the second is under 35 U.S.C. §103. In the first rejection, it is the examiner's position that the present claim would extend the monopoly of the Vonarburg patent because it would have been obvious to modify the patented Vonarburg toothbrush design to meet the terms of the toothbrush claimed in the application in view of the showings of Largever and Hyman. In the second rejection, the patented Vonarburg toothbrush design is utilized as a primary reference, with the examiner's theory being that the design shown in the application claim would have been obvious under Section 103 in view of the combined teachings of Vonarburg, Largever and Hyman. However, because the claim in a design patent is the article illustrated in the drawings therein, the issue with regard to both rejections is the same, namely, whether it would have been obvious to modify the toothbrush disclosed in the Vonarburg design patent in such a manner as to render obvious the toothbrush design presented in the application.

The guidance provided by our reviewing court for evaluating the obviousness of design claims under 35 U.S.C. § 103 thus is applicable to both rejections. The standard is whether a design would have been obvious to a designer of ordinary skill in the articles involved. In re Nalbaldian, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981). To support a holding of obviousness there must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design. Once a reference meets the test of a basic design, reference features may reasonably be interchanged with or added from those in other pertinent references. In re Rosen, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982). De minimis changes which would be well within the skill of an ordinary designer of the articles involved do not create a patentably distinct design. In re Carter, 673 F.2d 1378, 1380, 213 USPQ 625, 626 (CCPA 1982). It is distinctiveness in overall appearance of an object when compared with the prior art, rather than minute details or small variations in configuration, that constitutes the test of design patentability. In re Lapworth, 451 F.2d 1094, 172 USPQ 129 (CCPA 1971).

We agree with the examiner that Vonarburg constitutes a Rosen reference because it has design characteristics which are basically the same as the claimed design. We also agree that two differences exist between the Vonarburg toothbrush and the toothbrush presented in the application, in that the configurations presented by the distal ends of the bristles are not the same and Vonarburg does not disclose a color

contrast on the handle. The examiner is of the view that it would have been obvious to provide the Vonarburg bristles with the claimed configuration in view of Largever, and to provide a contrast in color on the handle in view of Hyman.

With regard to the former, the contour described by the distal ends of the claimed toothbrush is curvilinear and, as is illustrated in Figure 2, is marked by a central concave portion flanked by convex outer portions, with the convex portion at the toe having a smaller radius of curvature and being of lesser length than the convex portion located adjacent to the handle. The distal ends of the Largever bristles also present a configuration having a central concave portion flanked by convex portions, however, in Largever the convex portion at the toe has a larger radius, and a longer length, than the portion which is adjacent to the handle. Thus, in our view, the result of a designer of ordinary skill in toothbrushes modifying the Vonarburg bristle configuration by the teaching of Largever would not be the configuration transcribed by the claimed design, but the opposite of the claimed design.

We agree with the appellants that an important facet of the design of a toothbrush is its head and bristle configuration, which in our opinion is apparent from Figure 2 of the drawings. This being the case, from our perspective the differing bristle

configuration that would be presented by the modified Vonarburg toothbrush does not fall within the scope of a “de minimis” difference from that of the claimed toothbrush, that is, a minute detail or small variation in the design, as appears to be the examiner’s opinion. It therefore is our conclusion that, even conceding, arguendo, the position advanced by the examiner with regard to the addition of color to the Vonarburg toothbrush handle, the combined teachings of the applied references fall short of establishing a prima facie case of obviousness with regard to the claimed invention.

CONCLUSION

Neither rejection is sustained.

The decision of the examiner is reversed.

REVERSED

NEAL E. ABRAMS
Administrative Patent Judge

BRADLEY R. GARRIS
Administrative Patent Judge

ANITA GROSS PELLMAN
Administrative Patent Judge

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